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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91183753
Party	Plaintiff Heaven Hill Distilleries, Inc.
Correspondence Address	MATTHEW A WILLIAMS WYATT TARRANT & COMBS LLP 500 W JEFFERSON ST STE 2800 LOUISVILLE, KY 40202 UNITED STATES mwilliams@wyattfirm.com, mcapiro@wyattfirm.com
Submission	Motion to Strike
Filer's Name	Matthew A. Williams
Filer's e-mail	mwilliams@wyattfirm.com
Signature	/Matthew A. Williams/
Date	08/02/2010
Attachments	#20330736_v2_-_HHDI_-_Motion_to_Strike_Diallo's_Brief.pdf (3 pages)(10826 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

HEAVEN HILL DISTILLERIES, INC.,)		
)		
Opposer,)	Opposition No.	91183753
)		
v.)		
)	Serial No.	77/266,196
DIALLO YASSINN PATRICE,)	Mark:	HYPNOTIZER
)	Intl Class:	033
Respondent.)		

MOTION TO STRIKE RESPONDENT’S BRIEF ON MERIT FOR DEFENDANT

The Opposer, Heaven Hill Distilleries, Inc. (“Heaven Hill”), submits this Motion to Strike the Brief on Merit for Defendant of Respondent (“Brief”), Diallo Yassin Patrice (“Diallo”). As grounds for this Motion, Opposer states that Diallo’s Brief includes a number of exhibits that were not properly made of record by the Respondent during his designated testimony period, includes numerous factual allegations that are not supported by the evidence of record, and fails to comply with the format requirements specified in 37 CFR § 2.128(b).

During his designated testimony period, Diallo did not file a Notice of Reliance or offer any testimony. Accordingly, Exhibits 1-5 and 8-11 to Diallo’s Brief are not properly in evidence and should be struck and not considered by the Board (Heaven Hill recognizes that the Board may consider Exhibits 6 and 7, but only because the information in these exhibits, the TESS information for the HYPNOTIZER application being opposed in this proceeding and the registration certificate for Heaven Hill’s HPNOTIQ mark, is independently of record in this proceeding). To the extent the factual allegations in Diallo’s Brief are supported solely by reference to Exhibits 1-5 and 8-11, the Board should strike and not consider these portions of the Brief.

To the extent the Board may choose to characterize Diallo's submission of Exhibits 1-5 and 8-11 with the Brief during his testimony period as the submission of a Notice of Reliance, a characterization which Heaven Hill would strenuously object to, Heaven Hill notes that, with the exception of Exhibit 1, the proffered exhibits are not properly admissible via a Notice of Reliance.

Heaven Hill further notes that Diallo filed his Brief on April 17, 2010, two (2) days before the close of his testimony period. He then chose to improperly serve the Brief on Heaven Hill via the French mail system on April 18, 2010, resulting in Heaven Hill not receiving the filing until thirty-two (32) days later on May 20, 2010, well after the close of Diallo's testimony period. Heaven Hill's objection is therefore being timely made in conjunction with its brief on the merits pursuant to TBMP 707.02(b) since Diallo would not have been able to cure these defects even if Heaven Hill had objected on the day it received Diallo's Brief.

From a formal standpoint, Diallo's Brief consists of twenty-nine pages, seventeen of which are exhibits. In the twelve pages of text included in the Brief, Diallo has made no effort whatsoever to comply with the Board's formal rules for briefs that are explained in detail in 37 CFR § 2.128(b). While Heaven Hill recognizes that Diallo is proceeding *pro se* in this matter, this was his choice and should in no way excuse him from complying, or the very least making a good faith effort to comply, with the Board's rules, formal and otherwise, related to this proceeding. Since he has obviously made no attempt to do so, the Board should strike Diallo's Brief in its entirety.

Respectfully submitted,

/Matthew A. Williams /

David A. Calhoun

Matthew A. Williams

WYATT, TARRANT & COMBS, LLP

PNC Plaza

500 West Jefferson Street, Suite 2800

Louisville, Kentucky 40202-2898

(502) 589-5235

*Counsel for Opposer, Heaven Hill
Distilleries, Inc.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing Opposer's Brief has been served, via Federal Express, International Priority, this 2nd day of **August, 2010:**

Diallo Yassinn Patrice
2 Square Tribord
Courcouronnes 91080
France

/Matthew A. Williams /

*One of Counsel for Opposer,
Heaven Hill Distilleries, Inc.*

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